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Supreme Court, U.S.
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In the Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF ISSUES PRESENTED

Does a plaintiff who makes out a *prima facie* case of employment discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), combined with proof that the employer prevaricated about the reasons for its actions, present evidence to support a permissive inference of discrimination that is sufficient to withstand judgment as a matter of law?

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, ___ U.S. ___, 119 S.Ct. ___ (1999); *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *and Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998).

NELA members have brought innumerable cases in the wake of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*") and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517-18 (1993) ("*Hicks*") in which the method and respective burdens of proof for employment

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than the *amicus curiae*, its members, and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

discrimination cases has been a matter of dispute and confusion. NELA has an interest in the outcome of this case, as the Court's decision will restore clarity to an area often fraught with confusion.

SUMMARY OF ARGUMENT

Amicus requests this Court to restore confidence in a method of proof for employment discrimination cases devised a generation ago by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and ratified several times since. The petitioner, Roger Reeves, rightly complains (cert. pet. at 4-7) that the Fifth Circuit panel applied a heterodox version of the *McDonnell Douglas* inquiry, which allowed it to disregard a genuine issue of material fact about the employer's motivation (App. A at 8a, "a reasonable jury could have found that [employer's] explanation for its employment decisions was pretextual"), in favor of evidence that the panel believed—despite the jury's verdict—exonerated the employer of discrimination. Our members know from hard experience that such judicial pretermission of the jury's role is no longer uncommon.

In Section I, *amicus* reveals that courts in some circuits (the First, Second, Fourth and Fifth Circuits) now substitute their own judgment when weighing (on summary judgment or judgment as a matter of law) whether evidence of pretext supports an inference of discrimination. A majority of circuits—operationally or by express holding—entrust the finders of fact with this determination. Because of this split, practitioners know that judicial receptiveness to their client's cases or defenses is unduly sensitive to the circuit where one appears—and even to the panel one draws on appeal. To bring order to the chaos, the Court should rekindle the *McDonnell Douglas* principle that upon proof of the employer's prevarication, the jury may routinely draw a *permissive* inference of discrimination. This approach would still allow the courts ample latitude to consider summary judgment, or judgment as a matter of law, in appropriate cases. But it would also revoke the license, such as that taken by the Fifth Circuit, to simply draw a different inference than the jury did from the same record.

In Section II, *amicus* observes that the lower courts have spawned a host of counter-inferences or presumptions especially crafted to enable employers to defeat (or short-circuit) the inference of discrimination produced by the customary application of *McDonnell Douglas*. These include the "same actor" inference and the evidentiary category of "stray remarks." These counter-inferences unmistakably help employers—and *never* employees—win their cases. This Court has been forced in recent years to overrule such wanton instances of judicial lawmaking as the denial of same-sex harassment (*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1001 (1998)); the *prima facie* requirement under the ADEA for replacement of the employee from outside the protected age group (*O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996)); and the after-acquired evidence rule (*McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995)). As this case reveals, a return to first principles is in order: the lower courts need reminding that the anti-discrimination principles of the ADEA, Title VII, Americans with Disabilities Act and other federal statutes are plain and should not be adulterated by such extra-statutory pronouncements.

ARGUMENT

I. SEVERAL CIRCUITS—INCLUDING THE COURT BELOW—DENY JURIES THE OPTION OF INFERRING DISCRIMINATION FROM THE EMPLOYER'S PREVARICATION, AS THIS COURT ALLOWED IN *McDONNELL DOUGLAS*

This Court sanctioned a permissive inference in *McDonnell Douglas* for employment discrimination cases. Once a plaintiff establishes a jury issue about (1) her *prima facie* case of discrimination and (2) the employer's prevarication (or "pretext") concerning its reasons for the adverse employment action, a jury may be allowed to draw an inference of discrimination on her behalf. Experience in some circuits, though, has been that a plaintiff who establishes both predicates may still never get to the jury—or, worse yet, have a jury verdict directed away—because a judge or panel views the record differently. Such decisions warrant this Court's express disapproval.

A. This Court Endorses A Permissive Inference of Discrimination From the Employer's Prevarication, or Pretextual Explanation, About Its Actions Against the Employee

In *McDonnell Douglas*, 411 U.S. at 802, the Court held that a Title VII plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Following the *prima facie* case, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, plaintiff must "be afforded a fair opportunity to show that [the

employer's] stated reason for respondent's rejection was in fact pretext." *Id.* at 804. Such evidence might include "evidence that white employees involved in acts against [the employer] of comparable seriousness to [plaintiff's] were nevertheless retained or rehired. [The employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.*[2]

This Court has often reiterated this standard version of the individual, disparate treatment case. *See, e.g., Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357-58 (1977); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). As this Court later stated:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

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[2] "Other evidence that may be relevant to any showing of pretext includes facts as to [employer's] treatment of [plaintiff] during his . . . employment; [employer's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to [employer's] employment policy and practice may be helpful to a determination of whether [employer's] refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 804-05 (footnote omitted).

Furnco Const. Corp. v. Waters, 438 U.S. 567, 575 (1978) (citations omitted).

In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981), "[t]he narrow question presented [was] whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." The employer had won at trial, but suffered a reversal in the Fifth Circuit, which held that the employer had the burden of *proving* a legitimate, non-discriminatory reason for not hiring plaintiff. The Court held that the employer's burden was solely one of production, with the ultimate burden of proof on the plaintiff. Responding to concern that a mere burden of production gave the employer an opportunity and motive to fudge, the Court held that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." *Id.* at 258.

The Court clarified the plaintiff's burden on the final step of the *McDonnell Douglas* analysis:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. *But see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517-18 (1993)

Following *Burdine*, there ensued a split in the circuits about whether an employee was to adduce evidence over and above proof of pretext to support a finding of discrimination.[3] In *Hicks*, *supra*, the Court resolved (in a Title VII racial discharge case) that under the pretext analysis laid out in *McDonnell Douglas*—following the employer's proffer of legitimate, non-discriminatory reasons for its treatment of the plaintiff—"[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon rejection, 'no additional proof of discrimination is required'." *Hicks*, 509 U.S. at 511 (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)).

At the same time, the Court overruled the Eighth Circuit's holding in that case that "rejection of the defendant's proffered reasons *compels* judgment for the plaintiff." *Id.* at 511 (emphasis in original). This is because other factors in the record may point away from a finding of discrimination, such as (in Hicks's own case) that African-American employees served on the disciplinary committee, other African-American employees were not punished for the same conduct and "the number of black employees at St. Mary's remained constant." *Id.* at 508 n.2. A fact-finder must be allowed to weigh all of these factors, rather than simply be directed to enter a judgment based on one category of evidence (*i.e.* the employer's prevarication). *See id.* at 513-14 (the Court's hiring hypothetical). Thus, in *Hicks*, the Court knocked out the two extreme poles posited by some of the circuits (a mandatory presumption of discrimination on the

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[3] An account of this debate appears in *Kline v. TVA*, 128 F.3d 337, 342-43 (6th Cir. 1997).

one hand, or the requirement of additional evidence of discrimination on the other), leaving a permissive inference drawn by the trier of fact upon two predicates: the *prima facie* case and rejection of the defendant's proffered reasons.

This case, in material respects, offers us the same dynamic as *Hicks*. In this case, as in *Hicks*, the *prima facie* case was not in dispute (App. A at 6a) and plaintiff Reeves presented evidence that the employer disbelieved its own proffered reasons for terminating him (*id.* at 7a-8a). And in both cases, the courts of appeals erred by placing undue weight on one particular facet of the record. But there is also this salient difference: instead of considering only the evidence *detrimental* to the employer (as the Eighth Circuit did in *Hicks*), the panel below placed determinative weight upon *exonerating* factors (the age of the decision makers and the bottom-line numbers of older employees) (App. A at 7a-10a). Courts of appeals after *Hicks* were supposed to allow triers of fact to draw inferences from the record, but we shall see that the Fifth Circuit and a few other courts do not.

B. A Majority of Circuits Keep Faith With the Permissive Inference Established By *McDonnell Douglas* and Its Progeny

Following *Hicks*, the fulcrum in pretext cases shifted to a different inquiry: how deeply should the courts involve themselves (whether on summary judgment, judgment as a matter of law or on appeal) in determining whether the two predicates—the *prima facie* case and rejection of the defendant's proffered reasons—may support a finding of discrimination. Most courts have continued to reserve this ultimate issue of discrimination to triers of fact. In *Kline v. TVA*, 128 F.3d 337, 342-47 (6th Cir. 1997), the Sixth Circuit confirmed that a plaintiff need only present a *prima facie* case under *McDonnell Douglas* and evidence of the employer's prevarication to raise an inference of discrimination.[4] Plaintiff Kline, a African-American personnel officer for a utility, applied for a transfer to a posted human resources job. The hiring manager had already made up a list of candidates before Kline applied, so (without telling plaintiff) the manager had a subordinate place Kline's "resume in a desk drawer where it remained for the entire selection process and beyond." *Id.* at 339-40. A successor to the hiring manager eventually selected a white applicant (Becker), and Kline soon thereafter lost his job in a reduction in force. This occurred despite evidence that (1) Kline was superior to Becker in experience and education; (2) Kline (but not Becker) was denied an interview; and (3) a draft job description, upon which the manager allegedly made his decision, had been destroyed prior to the selection process. The district court tried this case and held that the process used to choose Becker over Kline did not discriminate by race. But the Sixth Circuit reversed, holding that the district court erred in holding that Kline was required to adduce "direct" evidence of discrimination in addition to proof of the *prima facie* case and pretext. "The import of the *Hicks* decision in this circuit is that once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination." *Id.* at 347.

This same approach has been followed expressly in the Third, Seventh and Ninth Circuits. In *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997), the court

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[4] The Sixth Circuit has adhered to this standard in other cases. *See also Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 421 (6th Cir.) (affirming jury verdict where primary evidence was proof of flaws in company's ranking policy), *pet. for cert. filed*, 68 U.S.L.W. 3292 (1999); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 835 (6th Cir. 1997) ("the law allows a factfinder to infer intentional discrimination from proof of the prima facie case coupled with a disbelief of the proffered reason for the employer's action, but such an inference is not required").

held that a plaintiff need only "cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible," and "once the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer." Likewise, the Seventh Circuit held in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) that "the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false."[5] Finally, the Ninth Circuit endorsed this analysis in *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993): "Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."

[5] *See also Statler v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 291-92 (7th Cir. 1999) (reversing summary judgment where record presented genuine question about whether store uniformly terminated employees guilty of "gross misconduct" under company policy, combined with fact that employer arguably changed its reasons for terminating plaintiff over the course of the litigation); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir.1999) (noting that *Hicks* decision rejected pretext-plus standard); *Janiuk v. TCG/Trump Co.*, 157 F.3d 504, 508-09 (7th Cir. 1998) (in ADEA discharge case, plaintiff produced organization chart showing that his job was filled by another, younger employee; chart established both an element of the plaintiff's prima facie case that he was replaced by a younger person, and pretext by revealing as false the reason given for his discharge); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 681 (7th Cir. 1996) ("[i]mplicit in the Court's holding [in *Hicks*] is the notion that, once the employee has cast doubt on the employer's proffered reasons for the discharge, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury not the court"); *Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995) (disbelief of the employer's reasons was sufficient by itself to raise a triable issue of fact).

The Tenth Circuit also recently sided with the straight pretext approach of the above courts. In *Beaird v. Seagate Technology Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, 119 S. Ct. 617 (1998). The panel majority held, in substantially reversing summary judgment for seven plaintiffs, that a plaintiff may "resist summary judgment if she can present evidence that [the employer's] proffered reason was pretextual, 'i.e. unworthy of belief,' see *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995), or otherwise introduces evidence of illegal motive" (footnote omitted). *See also Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994) (at the summary judgment stage, "if a plaintiff advances evidence establishing a prima facie case and evidence upon which a factfinder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder").

Different panels of the Eleventh Circuit have issued discrepant opinions, but that court appears to have settled upon the majority approach as well. In *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442 (11th Cir. 1996) (*per curiam*), *cert. denied*, 521 U.S. 1119 (1997), the court declared that disbelief of the employer's proffered justifications may not be enough to support a finding of discrimination.[6] But in *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532-33 (11th Cir. 1997), *cert. denied*, 118 S. Ct.

[6] *See also Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998) (relying on and citing to *Isenbergh*); *Walker v. NationsBank of Florida*, 53 F.3d 1548 (11th Cir. 1995) (separate opinions examine the pretext burden under *Hicks*, with the majority adopting a heightened standard of judicial scrutiny).

851 (1998), the court rejected the analysis in *Isenbergh* as dicta and held that a "plaintiff is entitled to survive summary judgment, and judgment as a matter of a law, if there is a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions." *Combs* now prevails in the Eleventh Circuit over *Isenbergh*.[7]

Two other circuits—the D.C. and Eighth—while noting that proof of pretext alone may not be sufficient in some cases to support of finding of discrimination, continue in operation to entrust that determination to the jury. In *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998), the *en banc* court declined to interpret *Hicks* categorically either to compel or to eschew presentation of additional evidence (besides the untruthfulness of the employer's reasons) to prove discrimination.

> "We ourselves do not read *Hicks* to say that a plaintiff who creates a genuine issue of material fact as to whether the employer has given the real reason for its employment decision will *always* be deemed to have presented enough evidence to survive summary judgment. Instead, the court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination and accordingly summary judgment is inappropriate. Under *Hicks* and other applicable law, however, a plaintiff's

[7] *See, e.g., Bogle v. Orange Co. Bd. of County Comm'rs*, 162 F.3d 653, 658 (11th Cir. 1998) (*Combs* "expressly rejected the suggestion, that had appeared in at least two of our prior decisions, that a defendant could succeed on a motion for summary judgment or a motion for judgment as a matter of law even though the plaintiff had plausibly discredited the defendant's proffered legitimate, nondiscriminatory reasons"); *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998); *Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir. 1998); *Evans v. McClain of Georgia*, 131 F.3d 957, 963 (11th Cir. 1997) (*per curiam*); *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997) (*per curiam*); *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997).

> discrediting of an employer's stated reason for its employment decision is entitled to considerable weight."

Id. at 1290. "[W]e do not endorse a reading of *Hicks* under which employment discrimination plaintiffs are presumptively required to submit evidence over and above such a rebuttal [of the employer's non-discriminatory reasons] in order to avoid summary judgment." *Id.* at 1292.

The facts in *Aka* illustrate that an employee can present a triable issue of fact about discrimination by relying primarily on the employer's prevarications. The employee, a hospital orderly who sought promotion to a Central Pharmacy Technician position, claimed violations of the ADEA and ADA. The *en banc* court reversed summary judgment. On the plaintiff's failure to promote claims under both statutes, the court found that disputed issues of fact existed about the plaintiff's qualifications for the job (*e.g.*, pharmacy experience, background in terminology used by doctors, training, degree of "enthusiasm") versus those of the candidate who was hired. In particular, regarding "enthusiasm," the court held that such a subjective qualification could be a legitimate, non-discriminatory reason for making a hiring decision, but that the plaintiff presented a genuine issue of material fact about his own "enthusiasm" via his own affidavit opposing summary judgment and that there was an absence of contemporaneous documentation by manager about the plaintiff's enthusiasm. In addition, the court credited other record evidence pointing to discrimination (*e.g.*, the hiring manager claimed an "aversion" to the plaintiff after the interview, and may have fabricated an "admission" by the plaintiff that he did not want the job).

The governing precedent in the Eighth Circuit is *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, 521 U.S. 1119 (1997), also an employer's appeal of a jury verdict and a Rule 50 motion. The majority opinion addressed the *Hicks* standard as follows:

> "In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no

> longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. Furthermore, as the *Hicks* Court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination."

Id. at 837-38 (footnotes omitted). The court noted that judgment as a matter of law might be appropriate, for instance, "where the evidence of pretext is inconsistent with an inference of intentional discrimination." *Id.* at 837 n.2.

Notwithstanding this language in *Ryther*, panels of the Eighth Circuit resist applying a pure pretext-plus standard. In *Keathley v. Ameritech Corp.*, 187 F.3d 915, 924 (8th Cir. 1999), an ADEA termination case, the panel reversed summary judgment, finding "most significant . . . evidence suggesting that Ameritech's stated reason for firing Keathley was a sham." And in *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484 (8th Cir. 1998), the court again reversed summary judgment in a Title VII termination case, based on evidence that the employer (a hospital) disciplined similarly situated female nurses less severely than the plaintiff for conduct that was more egregious than his. The panel observed that "the evidence Lynn presented was not inconsistent with the finding of [discrimination]; rather, it tended to show that [the hospital's] proffered reasons were flimsy, and thus susceptible of disbelief. Once a gender-discrimination plaintiff has done as much as Lynn, a jury may (but need not) find for him." *Cf. Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903 (8th Cir. 1999) (separate opinions discuss whether *Ryther* demands proof of "pretext-plus").

C. A Minority of Circuits Allow Roving Judicial Review of the Ultimate Finding of Discrimination

In contrast with the above courts, four other circuits—the First, Second, Fourth and Fifth—positively hold that courts shall decide as a matter of law whether proof of prevarication supports a finding of discrimination. Each of these circuits formally bifurcates the third step of *McDonnell Douglas* into separate inquiries, as the court did below: "To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." (App. A. at 6a.) This leads to cases where plaintiffs avowedly present a genuine issue about the veracity of the employers' proffered reasons, but the courts find such evidence insufficient to support liability.

The Fifth Circuit, in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), held that under the ADEA, "a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Id.* at 994. Applying this framework to a Title VII case, the Fifth Circuit tossed out a jury verdict for plaintiff in *Baltazor v. Holmes*, 162 F.3d 368 (5th Cir. 1998), and rendered a judgment in favor of the employer. Plaintiff, a white female clerical employee of the Orleans Parish School Board, claimed that the Board transferred her into a new title at lower pay than her male predecessor, an inequity then perpetuated by an African-American associate superintendent. A jury awarded $325,000.00 in compensatory and punitive damages against the Board and the superintendent, and the district court denied a judgment as a matter of law, holding that "'[t]he jury heard credible evidence of the job responsibilities

competently assumed by plaintiff, the position perceived by others, her request for reclassification, the racial hostility extant within the school administration and the school board's proffered reasons for refusing to take action on the matter.'" *Id.* at 374 (quoting the district court's ruling). Yet while the Fifth Circuit noted a "legitimate controversy over proper compensation and application of the procedures of reclassifying Baltazor's position," *id.*, it still held as a matter of law that the failure to upgrade plaintiff's title and salary was motivated neither by race nor gender.

Likewise, in *Travis v. Board of Regents*, 122 F.3d 259 (5th Cir. 1997), *cert denied*, 522 U.S. 1148 (1998), the Fifth Circuit held that the district court erred in denying judgment as a matter of law in favor of the employer. The plaintiff, an associate professor, alleged (among other things) that her denial of a promotion to full professor violated Title VII. The jury found that the failure to promote her was motivated by gender, and the judge awarded her retroactive promotion, and front and back pay. On appeal, however, the Fifth Circuit threw out the verdict, despite finding that there was a "legitimate controversy over the quality and importance of Travis's research" and that "a reasonable jury could have even concluded that the adequacy of Travis's research was not the real reason that the university twice denied her promotion." *Id.* at 264.

The Fourth Circuit, like the Fifth Circuit, insists upon separate inquiries into pretext and discrimination. In its most recent *en banc* decision, *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999), the court stated that "[t]o meet her burden of proving pretext, a plaintiff must prove both that the reason given for the adverse action by the employer was false, and that discrimination was the real reason." *See also Vaughan v. The Metrahealth Companies, Inc.*, 145 F.3d 197 (4th Cir. 1998) ("[e]ven where an employer's explanation for taking action is disputed or disproved, a discrimination plaintiff must come forward with sufficient evidence that she was the victim of

illegal discrimination before her case can go to the jury [citing *Hicks*]"). The Fourth Circuit frankly christened its approach as "pretext-plus." *Gillins v. Berkeley Elec. Coop., Inc.*, 148 F.3d 413 (4th Cir. 1998) ("[t]his court has adopted what is best described as the 'pretext-plus' standard for summary judgment in employment discrimination cases").

Thus, as in the Fifth Circuit, the Fourth Circuit has held in some cases as a matter of law that a genuine issue of material fact about pretext nonetheless failed to raise an inference of discrimination. In *Gillins*, 148 F.3d at 417, a Title VII racial demotion claim, the court affirmed summary judgment. Despite the fact that the plaintiff presented a triable issue of fact over whether the reasons given for not demoting two white incumbents were false, the court held that the claim failed because the plaintiff failed to advance additional evidence that his demotion was motivated by race. Also in *Vaughan*, 145 F.3d at 201, summary judgment was affirmed in an ADEA termination case, notwithstanding the district court (and court of appeals) finding that the plaintiff established a "genuine dispute over the credibility of the employer's proffered justification" (*i.e.*, compliance with a uniform "Downsizing Manual").

Like the above circuits, the Second Circuit held in *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998)—by an opinion joined fully by only six of the court's eleven judges—that a finding of pretext alone (in this case, by a judge following a bench trial) will not insulate a judgment from appellate review under a clearly erroneous standard. The majority wrote that a plaintiff "may prevail only if an employer's proffered reasons are shown to be pretext *for discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction or both. . . We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone. A finding of pretext may advance the plaintiff's case,

but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence." *Id.* at 1339 (footnote omitted). In line with its *Fisher* decision, the Second Circuit in *Belfi v. Prendergast*, 191 F.3d 129, 140 (2d Cir. 1999), affirmed summary judgment in a Title VII compensation case, despite allowing that the plaintiff had established that her employer's explanations for disparate salaries was pretextual. "[I]nconsistent and pretextual explanations do not constitute proof that the [employer] intended to discriminate against plaintiff because she was a woman. Absent that proof, a jury could not simply infer a discriminatory intent."[8]

Finally, the First Circuit held in *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994), that plaintiffs must not only present "'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus. . . . Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer." *Accord Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 34 (1st Cir. 1998); *Dichner v. Liberty Travel*, 141 F.3d 24, 30 (1st Cir. 1998) (referring to federal standard of proof as "pretext plus"). The First Circuit has gone as far as to say that "not only is a jury not required to infer discrimination from a showing of pretext together with the evidence underlying the prima facie case, *but the facts will often not*

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[8] Yet *Fisher* has not proven incompatible with a pretext-only analysis. *See, e.g., Banks v. The Travellers Companies*, 180 F.3d 358, 367-68 (2d Cir. 1999) (noting a 22-year gap in ages between candidates for discharge in ADEA case, a jury could have found that age motivated the termination because the "record appears to be devoid of any consideration other than the wide age discrepancy"); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998) (reversing summary judgment where plaintiff in a Title VII retaliation case raised factual issues about the asserted reasons for her discharge).

permit a jury to do so." Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co., 152 F.3d 17, 25 (1st Cir. 1998) (emphasis added), *cert. denied*, 119 S. Ct. 1778 (1999).

The plaintiff in *Alvarez-Fonseca*, a line supervisor at a bottling plant, claimed that he was terminated because of age. Plaintiff (age 54) argued with his manager (age 39), who called him "senile." A fistfight broke out between the men. In response, the company terminated plaintiff but merely suspended the manager for 30 days. A jury found that plaintiff's termination violated the ADEA and awarded $73,373.39 in back pay. On appeal, however, the verdict was annulled. The court allowed that "[a] jury could have disbelieved Pepsi's claim that its workplace rules required dismissal of an employee who initiated a fight in all cases," and thus "could question Pepsi's credibility." *Id.* at 25. Despite this, the court held that the plaintiff was unable to show that the real reason for his termination was his age, rather than violation of work rules. We note, however, that the First Circuit recently took a step away from the brink in *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999). There, the court reversed summary judgment in an title VII race case claiming discriminatory discipline and termination. It stated in a very comprehensive opinion that "[b]ecause discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate 'plus' factor, such as a negative employer comment about the plaintiff's protected class, in order to prove discrimination. Otherwise, the *McDonnell Douglas/Burdine* framework would no longer serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence." *Id.* at 57.

D. The Majority Approach Obeys this Court's Pronouncements, the Seventh Amendment Reexamination Clause, and Sensible Judicial Process

There are several reasons why the approach of these errant circuits must be rejected. First, it flies in the face of

this Court's pronouncements, unbroken from *McDonnell Douglas* to *Hicks*, that the finder of fact is entrusted to weigh all of the relevant factors. *Aikens*, 460 U.S. at 716 (1983) (the trier of fact "must decide which party's explanation of the employer's motivation it believes"). The minority circuit's approach is also out-of-sync with this Court's holding that an employer's failure to meet its burden of production under *McDonnell Douglas* mandates entry of judgment for the plaintiff. *O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996); *Hicks*, 509 U.S. at 509-10 and n.3. Accordingly, the proffer of an indefensible or vacuous excuse by the employer against the backdrop of the *prima facie* case warrants at least a permissive inference of discrimination.[9] Pretext-plus also abrades the Seventh Amendment's Reexamination Clause, which provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. *See generally Hetzel v. Prince William County, Va.*, 523 U.S. 208 (1998) (*per curiam*). While Congress has never taken a step to alter this Court's *McDonnell Douglas* order of proof, it has expressly provided

[9] *See, e.g., Chapman v. AI Transport*, 180 F.3d 1244, 1250 (11th Cir. 1999) (reversing summary judgment; "we are mindful that the 'poor interview' justification, without more, can provide a defendant-employer with a convenient smokescreen for precisely the type of discrimination that the ADEA was intended to eradicate, with virtually no provable recourse for the plaintiff"); *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 489 (8th Cir.1998) (where distinctions between male and female nurses for discipline proved "flimsy," this was sufficient to warrant a trial); *Widoe v. District No. 111 Otoe County School*, 147 F.3d 726, 730 (8th Cir. 1998) ("while defendant is certainly entitled to rely at trial on evidence that its employment decision was based upon legitimate subjective criteria and subjective impressions that were free of any discriminatory animus, there is genuine controversy at this summary judgment stage as to whether age was not a factor in the application of such subjective criteria or the formation of such subjective impressions").

for jury trials in Title VII, ADA and ADEA cases. *See* 29 U.S.C. § 626(c)(2); 42 U.S.C. § 1981a(c). Pretext-plus, as revealed by this case, is little more than shorthand for judicial reexamination of the fact-sensitive question of an employer's intent that Congress entrusted to juries.

Finally, the minority circuits display a nagging disregard for sensible judicial process. Pretext-plus heedlessly cuts the finding of discrimination from its moorings, leading to standardless review. The courts have been downright evasive in describing how pretext-plus is supposed to work. *See, e.g., Alvarez-Fonseca*, 152 F.3d at 24-5 ("[a]lthough the plaintiff must then prove both that the defendant's explanation is false, and that the real reason behind the defendant's actions was discriminatory animus, it will not always be necessary for the plaintiff to present additional evidence of discrimination beyond that necessary to prove that the proffered reasons are pretextual"); *Travis*, 122 F.3d at 263 ("it is possible for a plaintiff's evidence to permit a tenuous inference of pretext and, by extension, discrimination, and yet for the evidence to be insufficient as a matter of law to support a finding of discrimination"); *Fisher*, 114 F.3d at 1347 ("[w]hen a court comes to consider . . . whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence").[10] These vaporous guidelines invite the judge to resort to his own proclivities, an unwholesome alternative to the comparative certitude of *McDonnell Douglas*, *Burdine*, and *Hicks*. BENJAMIN

[10] It is no answer, as courts sometimes suggest, that "the fact that the employer is hiding something does not necessarily mean that the hidden something is discrimination." *Fisher*, 114 F.3d at 1346. Such a suggestion is a perfectly suitable point for a trier of fact to consider, and a defendant to make in closing argument, but it hardly justifies giving appellate courts a second crack at the record.

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS at 144 (1921)

> ("[t]he judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'").

The majority approach by contrast respects both the utility and limits of summary judgment, and judgment as a matter of law, in employment discrimination cases. In those circuits, one finds many such decisions reported. But the majority circuits reserve such review for cases where plaintiffs—in defiance of *Hicks*—virtually fail to confront the non-discriminatory explanations of the employer's actions *or* to proffer alternative evidence establishing bias. For instance, in *Diettrich v. Northwest Airlines, Inc.*, 168 F.3d 961 (7th Cir.), *cert. denied*, 120 S. Ct. 48 (1999), an ADEA failure to rehire case, the Seventh Circuit directed a judgment for the employer. Diettrich, an 53-year-old account manager, was not rehired based on an interview with a regional director. The airline based its decision upon a scoring system, based on past performance and an interview. While the plaintiff was asked different questions than other candidates during the interview, there was no evidence that this was because of age. Moreover, that the youngest among twelve candidates received the highest scores and older candidates the lowest scores was determined not to support an inference of age animus: the numbers lacked statistical significance, it was conceded that the interviewer did not know the ages of the candidates, applicants close to plaintiff's age got jobs, and there were enough jobs for all candidates (so the interviewer had no motive to skew results to younger candidates). A failure

to respond to these facts with any precision, in the absence of prevarication, warranted reversal of the jury's verdict.[11] This Seventh Circuit reversal is a far cry from the present case, however, where the record before the Fifth Circuit reflects jury issues on both the prima facie case and the employer's non-discriminatory explanation.

There also arise occasions where a judgment for an *employer* must be vacated. In *Kidd v. Illinois State Police*, 167 F.3d 1084 (7th Cir. 1999), the district court (as trier of fact) erred by relying on an employer's internally inconsistent explanations to justify its racially disparate treatment of its employees. Plaintiff Kidd, an African-American probationary state trooper, alleged that he was terminated in violation of Title VII for alleged deficiencies in communications skills. While not denying that his score was low in this area, plaintiff established that a white probationary officer with the same problems was given training and opportunities to correct his performance, while the department waited six months to address plaintiff's problems. The district court found that the department's explanation for differential treatment—that the white officer was singled out for training because his communications deficiencies were "more easily discerned"—was not pretextual and that the employees were not similarly situated in terms of their

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[11] Another situation where judgment as a matter of law or summary judgment might be appropriate may be "where the evidence of pretext is [itself] inconsistent with an inference of intentional discrimination," thus contradicting the inference raised by the *prima facie* case. *Ryther*, 108 F.3d at 837 n.2. Such cases essentially amount to concessions by the plaintiff that the motivating reason was some factor *other* than invidious discrimination. *See, e.g., Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 108 F.3d 935, 938 (8th Cir. 1997) (evidence of "pretext" pointed to personal favoritism, rather than sex discrimination), *cert. denied*, 522 U.S. 1075 (1998); *Visser v. Packer Eng'g Assoc.*, 924 F.3d 655, 657 (7th Cir. 1991) (*en banc*) (on summary judgment record, evidence of "pretext" pointed to plaintiff's disloyalty to CEO, not age discrimination).

apparent need for remedial intervention. On appeal, the Seventh Circuit held that this finding stood in significant conflict to the record, including examination of the officers' writing samples, their grades at the academy for writing, the fact that both officers as cadets initially failed to pass at the academy, and admission that plaintiff's shortcomings were commonplace and subject to correction. The district court was directed to review and reopen the record to iron out these inconsistencies. *See also Kline v. TVA*, 128 F.3d 337, 352 (6th Cir. 1997) (findings of fact regarding pretext reversed because they were based on "contradictory and evasive testimony").

In sum, *amicus* encourages the Court to revive the principle that the jury decides, upon a trial on the merits, whether evidence of pretext is enough to support a finding of discrimination.

II. SOME COURTS APPLY LOGICALLY DUBIOUS COUNTER-INFERENCES TO GRANT SUMMARY JUDGMENT AND REWEIGH JURY VERDICTS

This Court has previously cautioned lower courts against erecting extra-statutory presumptions in employment cases, especially those touching on the motivations of the employer. For instance, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). Thus, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1003 (1998), this Court unanimously rejected a presumption under Title VII that men could not sexually harass other men in the workplace. The Court stated that "in the related context of racial discrimination in the workplace we have rejected any *conclusive presumption* that an employer will not discriminate against members of his own race." *Id.* at 1001 (emphasis added).

Skepticism of such extra-statutory presumptions and shortcuts has been a leitmotif of this Court's recent employment discrimination jurisprudence. *See, e.g., O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996) (rejecting conclusive presumption that ADEA plaintiff replaced by another employee age 40 or over cannot prove age discrimination); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) (rejecting conclusive presumption that employee who committed terminable offense, undiscovered by employer prior to litigation, cannot prove liability under ADEA); *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) (rejecting conclusive presumption that harassment had to lead to diagnosable psychological injury before it was severe enough to be actionable under Title VII); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (rejecting argument that because there was no evidence of racial animus by union in failure to process grievances of racial discrimination, there could be no Title VII liability).

The Court's decisions often recognize that the unadorned statutory language and purpose of Title VII and kindred statutes, like the ADEA, do not carry the kind of freight—in the form of evidentiary presumptions—that lower courts too often place on them. These statutes are to be interpreted broadly to effectuate the Congressional purpose of ridding interstate commerce of invidious discrimination. *Oncale*, 118 S. Ct. at 1002 ("[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII"); *McKennon*, 513 U.S. at 357 (ADEA must be interpreted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions"). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (in the face of doubt about the meaning of Title VII, we look to "the broader context of Title VII" to resolve ambiguities).

After all, the question posed in disparate treatment cases is fundamentally a simple one: whether the trier of fact credits the employer's or employee's version of the reasons for alleged disparate treatment. This Court stated in *Cooper*, 467 U.S. at 874:

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision "remains at all times with the plaintiff," [*Burdine*, 450 U.S. at 253], and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716, 103 S.Ct. at 1482.

The Court commended this analysis to the trier of fact. *Aikens*, 460 U.S. at 714 n.3 ("[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"). This is because:

> the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," *Burdine*, *supra*, at 252, 101 S.Ct., at 1093, in deciding this ultimate question.

Id. at 716. The analysis of the ultimate question should not be befouled or misdirected by judicial presumptions. Just how uncomplicated this analysis can be is illustrated by the model jury instruction Judge Easterbrook devised in *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995): "you must decide whether the employer would have fired [demoted, laid off] the

employee if the employee had been younger than 40 and everything else remained the same."

Yet in spite of the admonitions of this Court, some lower courts continue to formulate and apply straitjacketing presumptions and inferences to evaluate the ultimate question of discrimination. Appellate opinions have increasingly come to resemble decision-trees, assaying each piece of evidence with a bank of stereotyping tests. The decision below displays some of these unfortunate tendencies. The *amicus* brief filed by the AARP addresses two such tests—"stray remarks" and whether the decision-maker was in the protected group—and we adopt its analysis on these points. A cousin to this argument that has taken hold in a number of circuits, is the so-called "same actor" inference. It is a virtual laboratory for the muddle caused by presumptions.

Some courts recite a "same actor" inference that a decision maker who hired or promoted an employee in the first instance would not typically harbor a discriminatory animus against the same employee later on (at least over a short enough period). Some decisions accord this inference strong weight,[12] while others consider it an issue for the

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[12] *See, e.g., Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996) ("where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive"); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) ("[t]his 'same actor' inference has been accepted by several other circuit courts, and we now express our approval"); *EEOC v. Our Lady of Resurrection Med. Center*, 77 F.3d 145, 151 (7th Cir. 1996) ("[t]he same hirer/firer inference has strong presumptive value"); *Buhrmaster v. Overnight Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995), *cert. denied*, 516 U.S. 1078 (1996); *Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991).

finder of fact.[13] But a principled objection could be launched at this entire line of cases: it allows too many exceptions to have any predictive power.

As the court noted in *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 745 (7th Cir. 1999):

> The psychological assumption underlying the same-actor inference may not hold true on the facts of the particular case. For example, a manager might hire a person of a certain race expecting them not to rise to a position in the company where daily contact with the manager would be necessary. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender and then fire that employee if she fails to comply with the employer's gender stereotypes. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring. If the employer subsequently discovers he does not wish to work with African-Americans and fires the newly hired employee for this reason, the employee would still have a claim of racial discrimination despite the same-actor inference.

To add but a few more real-life instances, (1) the employer may have been under transitory pressure to add more minority employees (*Fernandes v. Costa Bros. Masonry, Inc.*, ___ F.3d ___, 1999 WL 1252868 (1st Cir. Dec. 29, 1999) (No. 99-1692)); (2) the supervisor might have had little previous contact with minorities (*Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 291 n.3 (7th Cir. 1999)); or (3) other evidence of overt discrimination might simply outweigh the inference (*Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1253 (8th Cir. 1997)). Or perhaps a decision maker was unaware of an employee's protected traits, such as pregnancy or religion. Or the climate at the company might have changed over time, becoming less tolerant of the needs of older or disabled employees.

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[13] *Banks v. The Travellers Companies*, 180 F.3d 358, 367 (2d Cir. 1999) (same-actor inference at most a "commonsensical inference from the facts"); *Swanks v. WMATA*, 179 F.3d 929, 936 n.7 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3387 (1999); *Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1442 (11th Cir. 1998); *Waldron v. SL Indus.*, 56 F.3d 491, 497 (3d Cir.1995) ("where . . . the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value").

Amicus urges this Court to remind the courts below not to exalt or characterize special categories of supposedly exculpatory evidence in reviewing summary judgment or a jury verdict.

CONCLUSION

Judge Abner Mikva, late of the U.S. Court of Appeals of the D.C. Circuit, once expressed exasperation with his colleagues about the reversal of a preliminary injunction on appeal. "This case convinces me that we should install a witness stand and a jury box in the courtroom of this court of appeals." *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 914 (D.C. Cir. 1988) (Mikva, J., dissenting from the denial of the suggestion to hear the case *en banc*). This lament gives voice to the frustration of many employee-side practitioners (many of whom are members of *amicus*), who witness first hand how some courts routinely weigh facts in employment discrimination cases on summary judgment and after a trial, *always* to the detriment of the employee. It is nothing short of a refusal by those circuits to comply with *Hicks*—and a threadbare revival of the discredited "pretext-plus" rule. To restore the commonsense approach adopted by this Court a generation ago in *McDonnell Douglas*, *amicus* urges that the Court reverse

and remand the Fifth Circuit's decision below with directions to reinstate the jury's verdict and enter judgment for the plaintiff.

Respectfully submitted,

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